LETCHUMI AMMAL CHELLAPA

v.

NAM FONG HOUSING SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SYED OTHMAN FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 107 OF 1980]
3 MARCH 1982

CONTRACT: *Squatter house - Option to demolish or deliver vacant possession - Agreement to pay compensation - Performance - Whether time was essence of contract - Trespass - Effect of.*

The appellant had built a squatter house on the land owned by the respondent. By an agreement dated 16 February 1974 the owner/respondent paid the appellant RM600 for which she agreed either to deliver vacant possession of the house in question or demolish the same by 10 April 1974; in either event she will receive from the respondents RM5,400 by way of compensation. If she failed to do so she agreed to pay the respondent liquidated damages of RM200 per day.

As the appellant failed to fulfil her obligation the respondent brought an action against her to demolish the house and claimed damages of RM200 per day from 10 April 1974. At the material time the said house was occupied by a tenant who had verbally agreed with the appellant to deliver vacant possession on condition that RM3,000 was paid to him as compensation. Meanwhile the appellant took a third party notice against the tenant to indemnify her against the respondent's claim. However the tenant vacated the house on 31 August 1974 after receiving RM3,500 from the respondent.

The appellant brought an action against the respondent and tenant seeking payment of the RM5,400. The trial of these two actions was consolidated in the Sessions Court. The Court dismissed the appellant's claim against the tenant and also her claim against the tenant and also her claim against the owner for the balance sum of RM5,400.

The appellant was ordered to pay the respondent liquidated damages in the nominal sum of RM1 and to refund the RM600. On appeal by the appellant, the High Court affirmed the dismissal of her claim for RM5,400 but ordered the tenant to indemnify her the RM600. This appeal is against the High Court's affirmation of the dismissal. The main question to be determined is whether time was the essence of the agreement.

Held:

[1] The appellant knew time was the essence of the Contract, for she agreed to pay the penalty of RM200 per day, if she failed to perform her part of the agreement. The owner taking Court action to enforce the contract in about a month after default, showed that time was the essence of the contract.

[2] At law a squatter or trespasser has no right whatsoever to what he has affixed on the land without permission. The house the product of a trespass.

[3] The agreement by the owner to the appellant was merely an accommodation or expression of goodwill provided the agreement was performed in time.

[4] The appellant had helped herself to substantial gains by renting out the squatter house at RM80 per month for 20 years and in return paid nothing to the owner.

[5] Section 42 of the Contracts Act is not applicable.

[Appeal dismissed with costs. Deposit to the owner to the account of costs.]

Case referred to:
Loudon v. Ryder [1953] 2 QB 202; [1953] 1 All ER 741

Legislation referred to:
Contracts Act 1950, ss. 41, 42

For the appellant - C. Dass
For the respondent - K.L. Chai

JUDGMENT

Syed Othman FJ:

This appeal is against the decision of the High Court at Kuala Lumpur dismissing the appeal by the appellant against the decision of the Sessions Court dismissing her claim of RM5,400 under an agreement with the respondent (owner) a building developer and owner of a piece of land in Sentul, Kuala Lumpur, on which the appellant had built a house which was occupied by a tenant. On 16 February 1974 the parties entered into an agreement. In the recital, the main body of the agreement and in the appellant's own pleading the house was described as a squatter house.

The substance of the agreement was that the owner paid her RM600 and she agreed to quit and deliver vacant possession of the house which she had the option either to demolish or of which to deliver vacant possession by 10 April 1974; in either event the owner was to pay her a further sum of RM5,400 by way of compensation and travelling allowance; if the appellant failed to demolish or deliver vacant possession of the house on or before 10 April 1974 she agreed to pay the owner liquidated damages of RM200 per day for the breach.

The appellant did not fulfill her part of the bargain. In May 1974 the owner brought an action (Sessions Court Civil Action 369/74) seeking the appellant to demolish the house and liquidated damages of RM200 per day from 10 April 1974. The appellant entered her defence stating that the liquidated damages of RM200 per day was a penalty; she had been unable to fulfill her part of the bargain because the tenant staying in the squatter house refused to quit. The appellant took out a third party notice against the tenant seeking that he indemnify her against the owner's claim. The tenant in his defence of the third party notice stated that he had verbally agreed with the appellant to quit and deliver vacant possession of the house on condition that RM3,000 was paid to him as compensation on or before 10 April 1974; the condition was not fulfilled; he vacated the house on 31 August 1974 on the owner having paid him RM3,000. At the trial it was conceded the sum paid was RM3,500 (see p. 38 of appeal record). The appellant then brought an action (Sessions Court Civil Action No. 307/75) against the owner and tenant seeking payment of the RM5,400. The owner's defence to this claim, among other things, was that the appellant was precluded from the claim as she did not vacate the house by 10 April 1974 as required under the agreement.

The trial of these two actions was consolidated in the Sessions Court. The learned President allowed the respondent's claim ordering the appellant to pay the respondent liquidated damages in the nominal sum of RM1 and to refund RM600; he dismissed the appellant's claim against the tenant and also her claim against the owner for the balance sum of RM5,400.

The High Court at Kuala Lumpur in its appellate jurisdiction affirmed the dismissal of the appellant's claim against the owner, allowed the appeal against the tenant and ordered the tenant to indemnify the appellant the RM600 which she had to refund to the owner and to indemnify the owner and the appellant against all costs in both the Sessions Court and High Court.

In his judgment the learned President Sessions Court said that the appellant was to blame for not vacating the land by 10 April 1974. The learned appellate Judge said in effect that under the terms of the agreement, essentially, the owner agreed to pay the appellant RM5,400 on delivery of vacant possession on or before 10 April 1974; time was referred to in the agreement as to be of the essence; the appellant could not claim that she had performed her part of the bargain by the substituted performance of the tenant when she herself failed to perform her part of the bargain.

By the grounds of appeal it is contended in effect that the RM6,000 agreed to be paid under the agreement must be treated as compensation to demolish the appellant's house which the owner was obliged to pay notwithstanding late delivery; the trial Court was wrong in treating time as of the essence of the contract and in holding that the owner accepted late performance of the contract by demolishing the house; the appellant Court also erred in failing to apply s. 42 of the Contracts Act, 1950 (Revised -1974) and in not considering that the Sessions Court had erroneously applied s. 41 of the Act; the appellate Court did not apply the principles of equity in not allowing compensation to be paid for demolishing the house, and in not considering that she was a victim of the tenant's intransigence and that there was conspiracy between the owner and the tenant.

The main question to be determined is whether time was of the essence of the agreement before the appellant could be entitled to payment under the agreement. But we shall also deal with the consequential matters raised.

For the appellant it is argued that by the terms of agreement the promise of payment was in fact for compensation and time was not of the essence. It is also contended that the appellant Court has misconstrued the essential character of the agreement which was not an agreement for the plain delivery of the house but for its purchase for demolition and the RM6,000 was compensation for the purpose.

In dealing with the situation, the respondent could have taken Court action against the appellant, but the chances are the proceedings would have been protracted to the advantage of the appellant; the owner could have used reasonable force as was necessary to remove the house and the occupier, but any considerate owner of land would wish to avoid this course of action for fear of losing goodwill affecting the property and of those who live on the land. The owner chose a good course by trying to pay off the appellant and entered into the agreement.

For her difficulty with the tenant the appellant alleges there was collusion between the owner and the tenant when the tenant refused to move out in good time, and also says that even if the owner got possession of the house after the stipulated time, she must be considered to have performed her part of the bargain and entitled to the compensation under the agreement, and the compensation was in fact purchase price of the house.

To these arguments, it must be said that when she entered into the agreement she must have taken into account her relationship with the tenant. The fact that she agreed to pay, what the Courts below later held to be a penalty, RM200 per day, if she failed to perform her part of the agreement, shows that she knew that time was of the essence of the contract.

The fact that the owner took Court action to enforce the contract in about a month after default not only shows that time was of essence, but also dispels the allegation that the respondent could have been responsible for the tenant refusing to move out in time. It was not disputed that the appellant squatted on the land; she unlawfully occupied the land by building a house which she rented out. No evidence was adduced that she had obtained the permission of anyone before doing so, or that she had been paying anything for occupying the land. On this consideration by itself, the owner was entitled, using no more force than reasonably necessary, to remove the house without even asking the appellant's permission. At law a squatter or trespasser has no right whatsoever to what he has affixed on the land without permission. The house was the product of a trespass. There is no question of the owner of land having to purchase the house or having to pay compensation for its removal. The agreement in our view was nothing more than an accommodation or expression of goodwill by the owner of the land to the appellant, provided the agreement was performed in time.

It is further argued that since the owner got the house from the tenant in August 1974 and received benefit, the contract was therefore still subsisting. s. 42 of the Contracts Act 1950 referred to reads:

> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Applying the provision, the owner would be in the position of the promisee, the tenant would be the third person, and the appellant would be the promisor. The owner (promisee) in his action C.A. 369/74 against the appellant (promisor) sought performance and liquidated damages. At the trial the Court was informed that the house had been demolished and the owner had got back the land, only damages was to be determined. Enforcement of the contract, i.e. delivery of the house, does not therefore arise. But we are asked that the provision should be construed that when a promisee accepts performance of the promise from a third person and gets a benefit, he should pay the promisor compensation.

In reference to benefit we have been referred to a number of authorities. We do not think they are of any assistance in the present case. We have not been shown - nor are we aware of - any authority where a squatter or trespasser can be awarded compensation for squatting or trespassing or removal of any fixture put on the land by the trespasser. The present case stands on its own.

We do not think s. 42 of the Contracts Act can apply here for these reasons:

First, performance was not done within the stipulated time, as promised.

Secondly, the appellant's plea in her defence that she was unable to perform because the tenant had refused to vacate the house cannot be accepted in view of her express undertaking under the agreement.

Thirdly, the performance by the tenant by reason of his being paid by the owner cannot be regarded as performance by the third person within the meaning of s. 42 of the Contracts Act, as the tenant was in the same position as the appellant. There was nothing to prevent the owner from dealing direct with the tenant. If the owner had wanted to, he could have dealt with the tenant from the beginning; as soon as the tenant had vacated the house, he could have pulled the house down without paying the appellant anything. The tenant, knowing that the appellant and he himself were not on the right side of the law, and being in actual possession of the land, was in a better position to deal with the owner and surrender

the land. The indications are that wanting goodwill with everyone concerned the owner dealt with the appellant so that she could deal with the tenant and take away the house materials, if she so desired. There is every reason to believe that she failed to deal with the tenant, because, while she herself was prepared to accept benefit of the RM6,000, she in turn did not extend any part of the benefit to the tenant, who would have been badly affected by having to vacate the house and seek new accommodation.

Fourthly, the owner, by getting back the land, did not get any benefit. What he got was rightly his from the beginning.

We agree with the learned President, Sessions Court, that s. 41 of the Contracts Act is the appropriate section to apply here:

> 41. If it appears from the nature of the case that it was the intention of parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

The agreement clearly intended that the appellant would get the RM6,000 if she herself would demolish or deliver possession of the house by 10 April 1974. She did neither on the stated day. The fact that the owner paid the tenant RM3,500 on 31 August 1974, less than what he was prepared to pay the appellant if she had demolished or delivered the house by 10 April 1974, does not mean that the owner was accepting late performance. It fortifies the contractual intent, i.e. time was of the essence of the contract. The fact that she was held to ransom by her tenant is immaterial. She put him on the land. Under the agreement it was a matter for her to deal with the house and its occupier.

It should be borne in mind that the law is that when the defendant (in this case the appellant) has by trespass made use of the plaintiff's (in this case the owner's) land the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use, and it is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason. (See 11 *Halsbury's Laws of England*, 3rd Edn., p. 266, para 441). If the trespass is accompanied by aggravating circumstances, the owner of the land may be awarded exemplary damages. See *Loudon v. Ryder* [1953] 2 QB 202; [1953] 1 All ER 741.

If benefits are to be considered in the present case, on her own evidence the appellant has helped herself to substantial gains by arrogating to herself ownership of the land, paying no rent whatever and renting out the squatter house at RM80 a month for almost 20 years.

In the circumstances of the case, we cannot see that the law or equity can help her.

The appeal is dismissed with costs. Deposit to the respondent owner to the account of costs.

Also found at [1982] CLJ 295